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NO. 93-44

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *ET AL.*,

APPELLANTS

V.

FEDERAL COMMUNICATIONS COMMISSION, *ET AL.*,

APPELLEES

Appeal from the United States District Court
for the District of Columbia

BRIEF OF THE MEDIA INSTITUTE AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE

The Media Institute is a nonprofit research foundation specializing in the study of communications policy. As an independent and principled advocate of a robust press and a dynamic communications industry, the Institute dedicates its work to protecting freedom of speech, encouraging excellence in journalism, and fostering competition within the communications industry. The First Amendment rights of all speakers are now at risk in this case that is testing the authority of government to compel cable television to carry certain broadcast television signals. Any diminishment of the speech rights of cable television operators inevitably threatens the constitutional rights of all speakers.

That is the case because cable television, by freeing electronic communication from the limitations of radiated electro-magnetic waves, has created, and is continuing to develop, a medium of communications that is more diverse, more pluralistic, and more open than the present broadcast system. In the view of The Media Institute, more like the print medium. In fact, technological change is galloping at so rapid a pace that cable television and newspaper publishing are on the verge of using the same electronic means of communicating.

The Media Institute subscribes to the proposition that the way our society handles the electronic media is the preeminent free speech problem of our time. Ithiel de Sola Pool puts it starkly in TECHNOLOGIES OF FREEDOM, 10 (1983):

> The onus is on us to determine whether free societies in the twenty-first century will conduct electronic communication under the conditions of freedom established for the domain of print through centuries of struggle, or whether

that great achievement will become lost in a confusion about new technologies.

Indisputably, this new medium of cable television engages in speech that is protected by the First Amendment. *Turner Broadcasting System, Inc. v. FCC*, 113 S. Ct. 1806 (1993) (Rehnquist, C.J., in chambers). The Media Institute submits that the Congress has violated the First Amendment rights of cable television system owners by compelling that a substantial part of system channel capacity be devoted to the carriage of local broadcast television stations, programmers that are favored by Congress, which has now set aside the preferences of the cable system owner who, in the absence of the must-carry constraint, might choose to carry other programmers who will now be losing out to local broadcasters.

STATEMENT OF THE CASE; OPINION BELOW

Appellants are contesting the requirements of those provisions, §§4, 5 (47 U.S.C. §§534. 535) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, that compel cable television operators to carry the programming of local broadcast television stations. The requirement is not insubstantial, has the potential to remove from system owner control perhaps as much as 50% of channel capacity. Thus, a cable system with a capacity of more than 12 activated channels must devote up to one-third of those channels to the carriage of local commercial TV stations. 47 U.S.C. §534(b). In addition, cable operators must carry three noncommercial TV stations when system capacity is from 13 to 36 channels, and perhaps even more noncommercial stations when capacity is in excess of 36 channels. 47 U.S.C. §535(b). Beyond that, the holdover provisions of the Cable Communications Policy

Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, require a cable operator to relinquish editorial and business control over (1) such channels as the local cable franchise extracts for public, educational, and government access channels, 47 U.S.C. §531, and (2) for high-capacity systems, as much as 15% of channel capacity for leased access by persons unaffiliated with the system operator, 47 U.S.C. §532.

The dispute is here on appeal from a decision of a three-judge district court. *Turner Broadcasting System, Inc. v. FCC*, 819 F. Supp. 32 (D.D.C. 1993). Appellants contend that the mandating by government of cable carriage of broadcast TV stations violates their rights to freedom of speech and of the press, rights guaranteed by the First Amendment to the United States Constitution. The District Court, by a 2-1 vote, rejected the contention and upheld the constitutionality of the must-carry requirements. Evidence was not adduced; the dispute was resolved below on motions for summary judgment.

The District Court majority decided that must-carry was economic regulation, not regulation of speech, that the standard of strict judicial scrutiny did not apply, that the applicable standard was that established in *United States v. O'Brien*, 391 U.S. 367 (1968), and that the must-carry provisions satisfied the *O'Brien* test. *Turner Broadcasting*, 819 F. Supp. at 41, 45-7.

The majority opinion by District Judge Jackson noted: "That the First Amendment is to some extent implicated whenever a government endeavors to regulate a cable component...is a proposition now too-well established to reconsider [footnote, omitted]." *Id.* at 41. A concurring opinion by District Judge Sporkin, the other vote making up the majority of two judges, lashed at the cable industry for its

"mischievous" attempt to invoke the First Amendment.[1] It was "inconceivable," according to the concurring opinion, "that our forefathers at any time contemplated that the First Amendment would be used to regulate an industry that came into existence over 150 years after the Bill of Rights was adopted." *Id.* at 56.

Both majority opinions found that a significant government interest had been established by the record made in Congressional committee hearings, sufficient to satisfy the *O'Brien* test. Both are seemingly content to accept without more the Congressional judgment on the adequacy of the showing. This is to a large extent, key to the government's support of the must-carry provisions in the 1992 Cable Act.

Earlier, on two occasions, must-carry rules produced by the FCC had been invalidated because of the insufficiency of proof that there is a problem, proof that cable systems are not carrying broadcast signals, and that there is, for that reason, a substantial government interest. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988). In both cases, it was concluded that the FCC had failed to determine whether the problem that must-carry rules sought to correct "is a real or fanciful threat." *Quincy* at 1463; *Century* at 305. In both cases, too, certiorari was denied.

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[1] In *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979), the court at 709 n. 19 observed that a First Amendment claim against forced access "is not frivolous."

Despite the reliance of the majority below on the fact of a Congressional finding and on the sanctity of that finding, the opinions do go on to gesture in the direction of dealing with the basis for the Congressional judgment. But the exploration is principally given over to a recitation of the length of hearings and the number of witnesses, the bulk of which has to do with the entire 1992 Cable Act, not necessarily with the problem of cable's dropping or threatening to drop broadcast television stations. *Turner Broadcasting*, 819 F. Supp. at 39 n. 14.

The dissent of Judge Williams, on the other hand, does delve into the Congressional record. *Id.* at 63. It was the judgment of Judge Williams that there was some evidence that broadcast stations had been dropped but that 80% of cable systems had never discontinued carriage of a single local broadcaster. In his view, the facts behind the recitation of long hearings and numerous witnesses "...do not support an inference that over-the-air TV is at risk." *Id.*

SUMMARY OF ARGUMENT

Cable television's prominent experience with government regulation has been to try to break out of FCC rules that persistently restrained the industry's authority to carry broadcast TV signals. In short, cable has from the outset of its development been plagued by government limits on the amount of broadcast signal carriage that would be permitted. Thus, between 1966 and 1972, there was every two years a new FCC program that continued to shackle cable's carriage of broadcast stations. The majority below dwells extensively on the growing supremacy of cable as a delivery mechanism for video programming but offers only small (e.g., "They vie with broadcasters for 'local' advertisers," 819 F. Supp. at 44)

rationale for any possible interest of cable in wanting to discontinue the carriage of broadcast TV stations.

Assuming that *O'Brien* is the appropriate standard for assessing the constitutionality of must-carry, it is contended here that:

(1) As in the *Quincy* and *Century* cases, there has been a failure again to establish that there is a significant government interest to be protected. Or, stated graphically, that there is a problem that must be cured by government's compelling cable systems to carry broadcast TV stations. Only the dissent in the decision below bothered to examine the evidence before the Congress. The majority is content to rely on what it apparently believes is a large number of witnesses and hearing days, all without analysis of how much of the Congressional exploration was given over to must-carry, which ended up as only two sections in an omnibus cable bill of 28 sections.

(2) The decision below and the mandatory carriage rules must fail because must-carry is an overbroad solution and burdens the speech of cable television system owners more than is necessary to cure the perceived problem. By way of example, there are at hand or available other avenues for broadcast television to assure access to the larger cable audience, all without intruding on cable TV's First Amendment rights: Broadcast television ownership of co-located cable television is barred by Congressional statute and by FCC regulation. 47 U.S.C. §533(a); 47 C.F.R. §76.501. The original reasons for imposing the ban--to contribute to diversity and to avoid the possibility that broadcast TV might impede the development of cable--no longer obtain. Dropping of the ban would allow local broadcast stations, separately or in concert, to build their own cable television facilities for

carriage of their signals. Additionally, access to cable's audience may be leased from the cable system. Leased access is guaranteed by 47 U.S.C. §532.

Overridingly, however, amicus contends that the must-carry rules are content-based and subject to strict judicial scrutiny. *See, e.g., Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987). There is semantic dispute in the decision below as to when government conduct constitutes suppression of free expression or is merely an incidental burden on speech. The majority appears to accept the proposition that government can be said to be intruding on free speech only when it dictates the message or the subject matter to be carried. *Turner Broadcasting*, 819 F. Supp. at 42. The dissent of Judge Williams, on the other hand, finds that "In requiring cable systems to carry a special group of competing speakers, Congress directly, not incidentally, restricts the cable operators' exercise of editorial discretion." *Id.* at 67.

Clearer evidence that must-carry is not content-neutral is at hand in the language of §4 of the 1992 Cable Act, 47 U.S.C. §534, where in subsection (g)(1) the right to must-carry status is denied to television stations that are "...predominantly utilized for the transmission of sales presentations or program length commercials." But the same §4 in subsection (g)(2), directs the FCC to conduct a proceeding to ascertain whether such stations[2] are serving the public interest, convenience, and necessity. Standards are next provided for making

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[2] Labeled "home shopping stations" in FCC proceedings. Report and Order in MM Docket 93-8 (Home Shopping Station Issues), 58 Fed. Reg. 39156, 73 Rad. Reg. 2d (P&F) 355 (1993).

that assessment. If the FCC concludes favorably for such stations, must-carry status is conferred. Tellingly, finally, and in the event the FCC finds against home shopping stations, the Commission is directed to allow such stations to qualify for mandatory carriage by giving up the speech associated with sales presentations and program length commercials.[3] The preciseness of these instructions as to program content clearly demonstrates that the must-carry rules are inescapably involved with directing the message.

ARGUMENT

I. THE COURT BELOW RELIED ON THE WRONG TEST IN ASSESSING THE CONSTITUTIONALITY OF THE MANDATORY CARRIAGE RULES

(a) The Standard of Judicial Review in Speech Cases Turns on the Degree of Government Intrusion

The standard of review in First Amendment cases depends on whether the government regulation is content-based or content-neutral. If the intrusion mandates or suppresses particular speech, it is subject to strict scrutiny by the courts. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987); *Carey v. Brown*, 447 U.S. 455, 461-62 (1980). If, on the other hand, speech and nonspeech elements are combined in the same source of government conduct, a

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[3] 1992 Cable Act, §4(g)(2), 47 U.S.C. §534: "...the Commission shall allow the licensees of such stations a reasonable period within which to provide different programming...."

sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. In that case, a more lenient judicial review is indicated under the formula of *United States v. O'Brien*, 391 U.S. 367 (1968), as modified in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

A government regulation is sufficiently justified under *O'Brien*: "...if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction...[on speech] is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. The features of the *O'Brien* test that are in dispute in the subject challenge to mandatory carriage have to do with whether a substantial government interest--or the existence of a problem--is sufficiently demonstrated, and whether the cure is tailored--no greater than is essential--to curing the problem.

(b) Court Below Adopts *O'Brien*, but its Decision Favoring Validity of Must-Carry Fails to Satisfy *O'Brien* Standards

The majority in the 2-1 decision below concluded in favor of the government on both disputed features of the *O'Brien* test. With respect to the establishment of an important government interest, the opinion of Judge Jackson relies only on an inference that Congress had devoted substantial time to uncovering the problem of broadcast stations being dropped or not carried. Thus, *Turner Broadcasting*, 819 F. Supp. at 39 n. 14, has Judge Jackson relying on this quote from Sen. Inouye: ("[T]he bill before us is the result of 13 days of hearings and 113 different witnesses. We have had countless numbers of communications experts and lawyers

look over the measure. We have conferred with, in addition to the 113 witnesses, at least 500 knowledgeable citizens"). But 39 n. 14, where Judge Jackson spells out the details of the Congressional labor over a cable bill, appears to identify only one date, October 25, 1989, when inquiry was given over to must-carry. Neither in the statement of Senator Inouye nor in the majority opinions are details supplied having to do with numbers of stations dropped or not carried.

The must-carry provisions of the 1992 Cable Act, it is relevant to observe, involve only two sections, 4 and 5, in a statute that consists of 28 sections that deal with such prominent matters, in a bill that heralds "Consumer Protection and Competition," as Sec. 3. Regulation of Rates, Sec. 6. Retransmission Consent for Cable Systems, Sec. 7. Award of Franchises; Promotion of Competition, Sec. 8. Consumer Protection and Customer Service, Sec. 9. Leased Commercial Access, Sec. 10. Children's Protection from Indecent Programming on Leased Access Channels, Sec. 11. Limitations on Ownership, Control, and Utilization, Sec. 12. Regulation of Carriage Agreements, Sec. 13. Sales of Cable Systems, Sec. 14. Subscriber Bill Itemization, Sec. 15. Notice to Cable Subscribers on Unsolicited Sexually Explicit Programs, Sec. 16. Technical Standards; Emergency Announcements; Programming Changes; Home Wiring, Sec. 17. Consumer Electronics Equipment Compatibility, Sec. 18. Franchise Renewal, Sec. 19. Development of Competition and Diversity in Video Programming Distribution, Sec. 20. Customer Privacy Rights, Sec. 21. Theft of Cable Service, Sec. 22. Equal Employment Opportunity, Sec. 23. Judicial Review, Sec. 24. Limitations on Franchising Authority Liability, Sec. 25. Direct Broadcast Satellite Service Obligations, Sec. 26. Sports Programming Migration Study and Report, Sec. 27. Applicability of Antitrust Laws, and Sec. 28. Effective Date.

(1) Making Conclusive a Congressional Finding of Substantial Government Interest, as does the Majority Below, is Intolerable; would Undermine the First Amendment by Giving Congress Free Scope to Abridge the Freedom to Speak, all without Judicial Probing into the Correctness of the Rationale for Congressional Action. Writing separately,[4] Judge Sporkin, the other vote making up the 2-1 majority, is content to rely on Judge Jackson's vague findings as to the extent of the non-carriage problem that must-carry is designed to cure. *Turner Broadcasting*, at 53 n. 4. Moreover, and even though *O'Brien*, 391 U.S. at 385, does not require it, both judges fall back on their understanding that courts do not "ordinarily" review the adequacy of the record that the Congress acted on.[5]

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[4] The concurring opinion seems inordinately laden with reproach and incongruity. Plaintiffs are scolded for coming before the court "...not because their freedom of speech is seriously threatened, but because their profits are." Turner Broadcasting, at 54. "Programmers and broadcasters," it is asserted, "are not constitutionally protected groups." Id. at 56. And, "If the Cable Act compelled the cable programmers to carry the broadcasters' speech, or compelled the operators to relay a particular message, the Act undoubtedly would run afoul of the First Amendment." Id.

[5] Judge Jackson at 41: "The record in support of the 1992 Cable Act...was made by Congress. Federal courts do not ordinarily review the adequacy of the record before Congress to support the laws it enacts." Judge Sporkin at 51 (later at 53 n. 4, relying on Judge Jackson's recitation of number of days given over to large numbers of witnesses): "Congress' finding is based on an exhaustive Congressional record, and deserves the Court's deference."

That position is, however, intolerable where speech is at risk because it would render the First Amendment vulnerable to circumvention. The purpose of the First Amendment is, *inter alia*, to keep Congress from legislating to abridge the freedom of speech. The courts have tempered the seeming absoluteness of the ban by allowing intrusions when a sufficient government interest is established. But the First Amendment is diminished if Congressional action does not have to run the gauntlet of judicial review as to the correctness of a finding of government interest. Without judicial review of the record, for example, a venal legislature could declare that preserving full-service newspapers is a substantial government interest that justifies a rule that bans tabloids, shopping and real estate guides, etc. Without judicial review of the legislative finding, *O'Brien* would be no test at all and the safeguards of the First Amendment would be nullified. As if recognizing the weakness of the position, both majority opinions *do* make a pass at probing the record made before Congress, however imperceptibly their review touches on the problem of the extent of broadcast stations being dropped or not carried in the first instance.

(2) Dissent Below, Unlike Majority, does Measure and Evaluate the Record before Congress on Must-Carry, and Concludes that a Substantial Government Interest--or a Problem Demanding Correction--has not been Established. The dissenting opinion of Judge Williams, on the other hand, goes extensively into the details of the evidence available to the Congress. *Id.* at 63-4. There, the evidence before Congress of the numbers of stations dropped and carried is marshalled in specific support of the conclusion of Judge Williams that such activities "do not support an inference of peril to the broadcast industry or even any segment of that industry." *Id.* Thus, "80% of cable systems have never dropped a single local broadcaster." *Id.* at 63. "What

pertinent data there is on the record states that the average cable system in 1990 carried just over eight local broadcast signals (7% more than were carried in 1985)." *Id.*

(c) The Must-Carry Rules are, in Fact, Content-Specific and Demand Strict Judicial Scrutiny

It is clear, it is here contended, that the must-carry rules compel the speech of some and suppress the speech of others. Even the FCC concedes that. Thus: "These rules [must-carry]...are intended to compel carriage of broadcast signals in place of alternate programming that subscribers, if given their choice, might otherwise choose." *Rule Making to Delete Mandatory Signal Carriage*, 55 Rad. Reg. 2d (P&F) 1365, 1367 (1984).

(1) Majority Below would Invoke Strict Scrutiny only when Specific Speech or a Particular Message is Compelled. The majority opinions below are of the apparent view that, to invoke the strict scrutiny standard of review, the actual wording of the message, or something approaching that, must be government prescribed. Judge Jackson at 42: "A compulsory speech requirement...is to be strictly scrutinized only if it appears that the government has prescribed the content - either the message or the subject matter - of the speech to be spoken [footnote omitted]." Judge Sporkin at 56: "If the Cable Act compelled the cable programmers to carry the broadcasters' speech, or compelled the operators to relay a particular message, the Act undoubtedly would run afoul of the First Amendment."

At the same time, Judge Sporkin at 55 takes the position that: "The right-of-reply statute in Tornillo...plainly

[was] based on the content of the regulated speech."[6] That seems curiously at odds with his apparent view that the message must be "particular," perhaps as to wording or at least as to view. The particulars of the compelled speech or message in *Tornillo*, it may be observed, were not government-prescribed. All that was required was that a right of reply be accommodated, without regard to the content of that reply.

(2) Accepting Majority View of Strict Scrutiny, the 1992 Cable Act's Treatment of the Carriage Rights of Home Shopping Stations does Target, does Compel Specific Speech and Message, and Finally makes Clear that Must-Carry is Pure Content Control. But, even accepting the view that, to invoke strict scrutiny, the government intrusion must deal with and identify specific speech, it is the view here that that is precisely what the Congress has done, has identified specific speech. To demonstrate, the evidence as to how the Congress is treating the must-carry status of home shopping stations is impressive.

§4 of the 1992 Cable Act, 47 U.S.C. §534, in subsection (g), withholds the must-carry option from television stations that are "...predominantly utilized for the transmission of sales presentations or program length commercials." Stated otherwise, the target is home shopping stations.[7] At the outset, then, the must-carry entitlement is extended only to local broadcast stations that are not "...predominantly utilized

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[6] Miami Herald Publishing Company v. Tornillo, 418 U.S. 241 (1974).

[7] See n. 2, supra.

for the transmission of sales presentations or program length commercials." That language in §4 (g) of the 1992 Cable Act persuades that a feature of the must-carry requirement does identify and does separate out--withholds--particular speech from the entitlement otherwise extended to local broadcasters. But other aspects of shopping station carriage seem even more conclusive of the question of whether the government's insistence on mandatory carriage of broadcast television stations has to do with broadcast program content.

§4(g) also directs the FCC to conduct a proceeding to ascertain whether home shopping stations are serving the "public interest, convenience, and necessity." In making that appraisal, the Commission is required to consider: "...the viewing of such stations, the level of competing demands for the spectrum allocated to such stations, and the role of such stations in providing competition to nonbroadcast services offering similar programming." If the Commission finds that home shopping stations--and their program content--do serve the public interest, convenience and necessity, it must qualify those stations for must-carry status.

Almost certainly for the proposition that must-carry is content-driven, the Commission, if it finds against home shopping stations on the issue of service in the public interest, convenience, and necessity, is directed in §4(g) to allow such stations to qualify for mandatory carriage by giving up home shopping programming. Thus, at 47 U.S.C. §534(g)(2):

> In the event that the Commission concludes that one or more of such stations are not serving the public interest, convenience, and necessity, the Commission shall allow the licensees of such stations a reasonable period within which to provide different programming...."

To put it more vividly, a class of licensees is told that, in certain eventualities, they may have to suppress the speech associated with home shopping programming in order to qualify for the right to demand distribution by cable.

Further demonstrating the unmistakable import of the Congressional language of §4, that programming--or content--is a benchmark of the imposition of mandatory carriage, is the FCC's subsequent reaction to, and implementation of §4(g). Thus, to comply with the Congressional direction, the Commission undertook and completed a proceeding to measure whether home shopping stations may be said to serve the public interest, convenience, and necessity. *Report and Order in MM Docket 93-8* (Mandatory Carriage of Home Shopping Stations), 58 Fed. Reg. 39156, 73 Rad. Reg. 2d (P&F) 355 (1993). That *Report and Order* is replete with evidence of the Commission's understanding that it was required to, and did, consider content in estimating whether shopping stations deserve must-carry status.

For example, at ¶29, under "Public Interest Obligations," the Commission relies, *inter alia*, on evidence that:

> ...licensees of home shopping stations have addressed such issues as drug and alcohol abuse, AIDS, race relations, homelessness, basic legal knowledge for non-English-speaking viewers, and local political debates and election returns.

By way of further illustration, there is reliance in ¶30 on evidence that some shopping stations weekly devote 7.6% of total broadcast hours to local programming, 7.6% to news and public affairs, and 10.2% to nonentertainment programming.

Additional insight is provided in the Separate Statement of FCC Chairman James H. Quello and the Dissenting Statement of Commissioner Ervin S. Duggan, both statements appearing as attachments to the *Report and Order* on home shopping stations. Commissioner Duggan notes, 73 Rad. Reg. 2d (P&F) 355, 371, that Chairman Quello:

> "...has fought the must-carry battle valiantly throughout his career at the Commission; I know that he cares deeply about it, and I share his concern that we not damage must-carry's ultimate defense."

What Commissioner Duggan is referring to is the candid confession by Chairman Quello, *id.* at 365, that:

> ...I am concerned that a decision in this proceeding to exclude home shopping stations from must carry status solely because of their content would have jeopardized the legal defense of the must-carry rules [footnote omitted].

The omitted footnote spells out the Chairman's awareness that a content-based imposition on speech would involve a higher level of First Amendment scrutiny and undermine the constitutionality of the must-carry rules.

The Chairman's concern about not excluding shopping stations on the basis of content, lest the legal defense of must-carry be jeopardized, would seem to be conclusive of the point that the Congressional legislation is content-based. Thus, §4(g) clearly provides that home shopping stations cannot claim must-carry entitlement until the FCC completes a proceeding favorable to those stations on the question of their

programming or content. Therefore, what Chairman Quello felt would be a giveaway of a defense was in fact already surrendered by the Congress in this language from Sec. 4, 47 U.S.C. §534(g)(1):

> Pending the outcome of the proceeding under paragraph (2) [Commission proceeding to determine whether home shopping stations are serving the public interest, convenience, and necessity], nothing in this Act shall require a cable operator to carry on any tier...the signal of any commercial television station...that is predominantly utilized for the transmission of sales presentations or program length commercials.

(d) The Strict Scrutiny Test Applies to These Content-Driven Requirements and the Decision Below must be Reversed and the Must-Carry Rules Deemed Invalid

Since the must-carry rules are demonstrably content-based, they are a direct and not an incidental burden on speech. Government must, therefore, justify the requirements of forced carriage on the basis of a compelling government interest, and the requirements must be closely drawn to avoid unnecessary abridgement of speech. *See, e.g., Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 535, 540 (1980); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). As will be demonstrated *infra*, the rules are invalid for, at the very least, failing the test that they be closely drawn.

II. COURT BELOW REACHED WRONG RESULT EVEN UNDER THE MORE FORGIVING O'BRIEN TEST

(a) Substantial Government Interest Not Sufficiently Established

The purpose of the must-carry requirements of the 1992 Cable Act is to assure local broadcast television's access to cable television's audience. But the history of government's persistence in insisting on mandatory carriage is puzzling[8] because cable television, from the outset, has not only

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[8] The *Quincy* court, 768 F.2d at 1440, noted that the FCC considers broadcasting to be "society's chosen instrument for the provision of video services." In that connection, it is useful to reflect that broadcast networks pay their affiliated TV stations to carry network program lineups. In that context, it may be speculated that must-carry surfaced at an early stage to ward against TV stations having to pay for cable carriage. Pursuing that possibility leads to the new must-carry rules that were adopted after the *Quincy* decision invalidated an earlier program. There, the Commission justified "The Need for Regulation" on what it described as "evidence in the record" that some cable systems had ceased carrying, refused to carry, "*and/or requested payment for carriage of stations.*" (emphasis added). *Report and Order in MM Docket 85-349*, 61 Rad. Reg. 2d (P&F) 792, 830 (1986). The Commission's new must-carry rules that are here challenged now prohibit a cable operator "...from accepting or requesting monetary payment or other valuable consideration in exchange either for carriage or channel positioning of any broadcast television station carried in fulfillment of the must-carry requirements...." 47 C.F.R. §76.60.

not resisted carriage of broadcast television stations, but has in fact been consistently restrained by government from expanding its carriage of broadcast stations. Admittedly, the government's insistence on carriage was only for local broadcast stations, and the resistance to expanded carriage had to do with distant stations. History, however, demonstrates not a cable resistance to local carriage but an eagerness by the cable industry to carry broadcast stations.

(1) Readiness to Assume that Cable must be Compelled to Carry Broadcast Stations Defies History and Logic. The mandatory carriage concept goes back at least to 1962 when the Commission first sought to impose must-carry as a condition for granting an application to construct a microwave system to transmit distant broadcast signals to a rural cable system. *Carter Mountain Transmission Corp.*, 32 FCC 459 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963). In 1965, the requirement was applied to all microwave-fed systems. *See, e.g., Quincy Cable*, 768 F.2d at 1440 n. 11. In 1966, mandatory carriage obligations were imposed on all cable systems. *Id.* All of that government regulation was imposed at a time when there was no point to cable's not carrying local stations because cable was basically an antenna service that sold only improved reception of broadcast signals. *See, e.g., Home Box Office v. FCC*, 567 F.2d 9, 21 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1978).

At the same time that the Commission was insinuating an obligation on cable systems to carry all local stations, the industry was being restrained by the Commission from expanding its carriage of broadcast stations. In 1966, when must-carry was locked in, the *Second Report and Order in Dockets 14895, 15233, and 15971*, 2 FCC 2d 725, 6 Rad. Reg. 2d (P&F) 1717, also principally featured a restriction on

cable systems operating in the top-100 markets, permitting them to carry distant stations only after an evidentiary hearing. Actual experience with the procedure "...soon revealed it to be largely unworkable." *Report, Economic Inquiry*, 45 Rad. Reg. 2d (P&F) 853, 865 (1979). In 1968, then, the FCC launched its *Notice of Proposed Rule Making and Notice of Inquiry in Docket 18397*, 15 FCC 2d 417, suspending the authorizing procedure of the 1966 rules and proposing a requirement that out-of-market stations could not be carried unless written permission of the station--*i.e.*, retransmission consent--was first obtained. Retransmission consent, however, "...did not prove to be a workable alternative...." *Report, Economic Inquiry*, at 866 n. 49. In 1970, then, the Commission's *Notice of Proposed Rule Making in Docket 18894*, 25 FCC 2d 38, offered up a complex program to permit the carriage in major markets of up to four out-of-market stations, provided the commercials on those stations were deleted and the advertising of local UHF stations substituted. The program was subsequently abandoned, but the result was to hold off for another two years cable's ability to increase the number of broadcast television stations that could be carried. In 1972, the *Cable Television Report and Order*, 36 FCC 2d 143, 24 Rad. Reg. 2d (P&F) 1501 finally broke the impasse by permitting the carriage of a limited number of distant stations, the number depending on the size of the television market, but in no case more than three commercial stations.

Invalidating the must-carry rules in *Quincy Cable*, the court observed[9] 768 F.2d at 1457 that:

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[9] The Quincy court, at 1439, noted that the regulatory result of the FCC's posture was "to protect an established industry [broadcast TV] from the encroachment of an upstart young competitor [cable]...." At Quincy, 1439 n. 10, it was

> In the two decades since the rules' original promulgation, the Commission has never seriously examined any of the admittedly speculative links in the chain of reasoning advanced in support of the rules. In particular, it has never sought support for the assumptions that are the linchpins of its analysis: (1) that without protective regulations cable subscribers would cease to view locally available off-the-air television...and (2) that even if some cable subscribers did abandon local television, they would do so in sufficient numbers to affect the economic vitality of local broadcasting.

History, it is believed, does not demonstrate an inclination by cable to cut back on its carriage of broadcast television stations. Nor is the record compiled by the

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observed that:

> Some analysts have taken a harsher view of the FCC's early regulatory posture. *See, e.g.*, H.R.Rep. No. 98-934, 98th Cong., 2d Sess. 22 (1984) ("FCC policies in [the] 1960s and early 1970s unfairly inhibited the growth and development of cable."); Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH.L.REV. 1, 40 (1976) ("There is considerable evidence that the Commission has been more concerned with protecting the economic interests of conventional broadcasters than with fully exploiting the resources of cable technology.").

Congress sufficient to establish new or any urgency attributable to cable's dropping or refusing to carry broadcast stations. Thus, the only evidence that the court below uncovered from the record before Congress in support of must-carry in the 1992 Cable Act is contained in the dissent of Judge Williams who culled the numbers and specifics from the record and found that the extent of non-carriage does "...not support an inference of peril to the broadcast industry or even any segment of that industry." *Turner Broadcasting*, 819 F. Supp. at 63-4. It was the view of Judge Williams that "...cable television appears to continue to be dependent on local broadcasters as critical suppliers of programming" and that "...cable simply cannot afford to drop broadcast channels to any significant degree." *Id.* at 64.

(2) Failure or Refusal to Carry is not Established as a Significant Problem and a Substantial Government Interest is not Demonstrated. It has not been established, it is submitted, that non-carriage is a problem. In that circumstance, a finding of the existence of a significant government interest cannot be sustained. The evidence on which the Congress acted, as uncovered by Judge Williams, is not up to disturbing the *Quincy* and *Century* precedents.

(b) Assured Access to Cable Television's Audience is Available to Broadcast Television without Burdening the Speech of the Cable Industry

The feature of the *O'Brien* test that insists that the remedy not be overbroad seeks a fit between the governmental interest and the regulation. If there are other cures available that do not intrude on speech, the must-carry requirement would inevitably be deemed overbroad. There are such availabilities.

(1) The Congress and the FCC, by Abandoning the No Longer Sustainable Ban on Broadcast Ownership of Cable, can Make Available to Broadcast Television Access to the Cable Audience. The Congress, 47 U.S.C. §533(a), and the FCC, 47 C.F.R. §76.501, have ruled out, and continue to prohibit, the cross-ownership of cable television by broadcast television station owners when the cable system and the television station are approximately co-located.[10] The original impetus for such a ban has been outdistanced by developments, and retention of the prohibition is now adverse to the government interest in curing the problem of assuring broadcast television's access to the audience that views television over wires. The FCC exclusion, first adopted in 1970, was premised on the assumption that separation of the media would contribute to diversity, *Second Report and Order in Docket 18397*, 19 Rad. Reg. 2d (P&F) 1775, and that, otherwise, broadcast television might retard the growth and development of cable television, *Memorandum Opinion and Order in Docket 18397*, 26 Rad. Reg. 2d (P&F) 739, 754 (1973).

The Congress has found that cable "...has become a dominant nationwide video medium." 1992 Cable Act, §2(a)(3). The stunting or impeding of cable's growth is now

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[10] The Congress provided that: "It shall be unlawful...." The FCC has enacted the ban as: "No cable television system...shall carry the signal of any television broadcast station..." if they are approximately co-located (emphasis in quotation added), thereby presumably recognizing that it is impossible to operate a cable system without TV station carriage and perhaps emphasizing the point that the cable industry is not likely to drop broadcast signals whose carriage is vital to cable system operation.

beyond the broadcast industry. And diversity would be enhanced if the cross-ownership ban were lifted and TV broadcasters permitted to launch their own competing cable facilities.

(2) The Leased Access Provisions of the 1984 and 1992 Cable Acts also Guarantee Broadcast Television's Access to the Cable Audience. Moreover--and short of building its own cable facilities--broadcast television now has guaranteed access to cable's audience via the leased access route. The cable industry has been legislatively required since 1984 to designate, for systems with 55 or more channels, up to 15% of channel capacity for commercial use by "persons unaffiliated with the operator [of the cable system]." 47 U.S.C. §532(b)(1)(B). A broadcast television station, now barred from ownership of local cable systems, surely qualifies as such an "unaffiliated" person. With the enactment of the 1992 Cable Act, loopholes in the original requirement have been closed by requiring the FCC to establish maximum reasonable terms, rates, and conditions for the use of leased channels, thereby reducing the opportunity for cable to outmaneuver the access obligation and making access a more meaningful avenue to cable's audience. 1992 Cable Act, §9.

III. CONCLUSION

Even under the more lenient *O'Brien* test, the mandatory carriage rules are unconstitutional. For all the foregoing, amicus curiae The Media Institute respectfully requests that the decision below, upholding the validity of mandatory carriage, be reversed.

Respectfully submitted,

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